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No. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO), *et al*,

Petitioners,

v.

PAUL E. SCOTT, *et al*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF FOR ASSOCIATED BUILDERS & CONTRACTORS, INC., AMICUS CURIAE

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Associated Builders & Contractors, Inc. respectfully moves for leave to file an Amicus Curiae Brief in this cause. Respondents have consented to the filing of this Brief. The letter of consent accompanies this Motion and Brief, for filing with the Court. Counsel for Amicus has sought the consent of Petitioners to the filing of this Brief by written correspondence. As of the time of preparation of this Motion, counsel for Petitioners have not responded to said request for consent.

The Associated Builders & Contractors, Inc. is a nation-wide, non-profit corporation with over 17,000 member companies in the construction industry in the United States. During its 32-year existence, the Association has united construction contractors of all trades who believe in free enterprise in the construction industry. The Association assists its members through apprenticeship programs, seminars, publications on business

developments, safety in the industry, labor relations and related activities. These contractors employ workmen regardless of membership or non-membership in labor unions and abide by their choice to have or decline collective bargaining by a union pursuant to their fundamental rights and Section 7 of the National Labor Relations Act.

This case is of great importance to the Association as it concerns matters which involve all of its members. The small, local contractors in this country are very concerned that the rights they and their employees have always enjoyed not be taken away. A. A. Cross Construction Company, one of the Respondents, was an Association member at the time of the incidents involved in these proceedings.

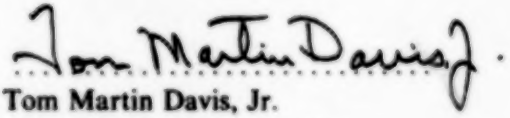
The Association believes that the Respondents' fundamental rights of association were violated by the violent actions of the Petitioners and that the only adequate means of redressing this violation is under 42 U.S.C. § 1985(3). The remedies available under the National Labor Relations Act, of which Respondent, A. A. Cross Construction Company availed itself, are incapable of remedying the type of harm involved in these facts. The Labor Board's injunction as to the Petitioners, prohibiting future violent acts, offers no salve for the wounds already inflicted. To prevent future harm means little to the one who has just experienced the devasting effects of violent activity. In this instance, where the fundamental right of association is violently infringed upon and the Board's remedies are sadly inadequate, resort must be available to the remedial processes of § 1985(3).

Because of the Association's membership and unique function in the construction industry, it is well qualified to submit an amicus brief in this proceeding. Particularly in relation to the issue addressed in this brief — Section 7 rights of employees, though protected by the National Labor Relations Act, encompass fundamental rights protected in other federal statutes, specifically, 42 U.S.C. § 1985(3).

On the issues addressed in the Respondent's Brief, we associate with the ably-presented positions of the Respondents. Our purpose herein is to suggest several additional considerations to guide the Court.

For these reasons, we respectfully request leave to file this Amicus Curiae Brief.

Respectfully submitted,



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BRIEF FOR ASSOCIATED BUILDERS & CONTRACTORS, INC. AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae is set forth in the preceding Motion for Leave to File this Brief.

SUMMARY OF ARGUMENT

The Respondents in *Scott* v. *Moore* bring their cause of action under 42 U.S.C. § 1985(3). The Petitioners have asserted that Respondents have two major problems with their ability to bring suit under § 1985(3). First, they have stated that the right of

employees to refrain from organizational activities is not a constitutionally protected right and as such does not come within the scope of § 1985(3); and second, that the problems addressed in *Scott* v. *Moore* are labor law issues and as such subject to the exclusive jurisdiction of the National Labor Relations Board under the preemption doctrine of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

A consideration of the historical background of the Section 7 right to refrain from organization refutes any assertion that the right has no significance apart from the National Labor Relations Act (hereinafter "Act"). The right is clearly a fundamental right derived from the historical right of association, right of assembly and right to pursue a chosen trade. Section 1985(3) extends to protect all rights which are fundamental rights of national citizenship, *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), and included in these rights is the right of association.

The preemption doctrine of *Garmon* with respect to labor disputes, although still valid with regard to typical, uncomplicated labor situations, has become riddled with exceptions both through congressional enactment and through judicial decisions. The Respondents in *Scott* v. *Moore*, by seeking to litigate their claims under § 1985(3), are not forging new paths but merely following in the footsteps of those who have gone before them. The facts before us lend credence to the assertion of an exception to the labor preemption doctrine. The violent nature of the Petitioners' action, coupled with the inadequacy of the Board remedies available, clearly places us within established exceptions to the doctrine.

The fundamental nature of the rights asserted herein when considered with the violently abusive actions of the Respondents, merit this Court's upholding the decision of the Fifth Circuit in order to provide the Respondents with the remedy to which they are entitled.

ARGUMENT

I.

THE RIGHT TO REFRAIN FROM ORGANIZATION, GUARANTEED TO EMPLOYEES UNDER SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT, ORIGINATES FROM THE FUNDAMENTAL RIGHT OF ASSOCIATION AND THE NATIONAL LABOR RELATIONS BOARD'S JURISDICTION IN THIS AREA IS CONCURRENT WITH THAT OF THE FEDERAL AND STATE JUDICIARY.

Petitioners here assert that the right of an individual to refrain from organization does not qualify the Respondents for constitutional protection. (Petitioner's Brief at p. 7). They have argued previously that such right originates from the National Labor Relations Act and that under the *Garmon* doctrine of labor law preemption, considered with the Supreme Court's rationale in *Great American Fed. S&L Assn.* v. *Novotny*, 442 U.S. 366 (1979), a cause of action does not exist under 42 U.S.C. §1985(3) for a subsequently created statutory right.

A. The Associational Right Of An Employee To Refrain From Organizational Activity Is A Fundamental Right Which Preceded The Enactment Of The National Labor Relations Act

Petitioners in their brief to the Court assert that the employees right to refrain from organizational activity is not included in the First Amendment right of association. (Petitioners' Brief at p. 7). Accordingly, they urge that this Court find error with the Fifth Circuit's position that "there is an associational right stated in the Constitution to work in the private sector under an industrial relation system of one's choice." (Petitioners' Brief at p. 12). Since they do not view the employee's right to refrain from organizational activity as a constitutionally protected right, it is the Petitioners' position that the *Novotny* decision is controlling in this instance, where the Court found

that statutorily created rights are not covered by Section 1985(3). (Petitioners' Brief at pp. 10, 11).

It is Respondent's position, and this amicus brief will show, that the right asserted in *Scott* v. *Moore* is indeed a fundamental right which although embodied in the Constitution, actually pre-exists that document. The Petitioners' contentions throughout their brief are based largely on the premise that the right to refrain has no independent basis apart from the National Labor Relations Act; once this point is refuted, the Petitioners' objections to Respondents' cause of action under §1985(3) collapse.

The employee's right to refrain from organizational activity was included in Section 7 of the National Labor Relations Act by the Taft-Hartley Amendments, officially known as the Labor Management Relations Act of 1947. These amendments were enacted to counterbalance the restrictions placed upon employers by the National Labor Relations Act of 1935, by placing similar restrictions on the unions. The amendment to the Section 7 rights of employees, by the addition of the right of employees to refrain from exercising organizational rights, was intended to give equal weight to the Section 7 rights of employees to either organize or choose not to organize, an accommodation somewhat obscured under the original Act.

The Supreme Court, in the historic decision of *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1936), which confirmed the validity of the National Labor Relations Act and upheld its provisions as constitutional, also described the right of employees to organize and converse (the Section 7 rights of the new Act), as "a fundamental right." In referring to section 7, the Court stated:

> Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without

> restraint or coercion by their employer. *That is a fundamental right. Id.* at 33 (emphasis added).

The Court recognized the legality of collective action on the part of the employee and stated that Congress by enacting the National Labor Relations Act was "safeguarding the right of collective action." *Id.* at 34. Emphasizing the importance of non-interference with this freedom of choice and addressing the allegation that the employer's constitutional right had been interfered with, the Court stated that, "instead of being an invasion of the constitutional right of either, [the prohibition] was based on the recognition of the right of both." *Id.* It is clear from the above comments that by enacting the National Labor Relations Act, Congress did not create any new rights, but merely recognized and "safeguarded" pre-existing rights.

An analysis of this "right to refrain" is important in order to understand what led the Court to describe this right as a "fundamental right," which pre-existed the National Labor Relations Act. A consideration of the numerous court decisions, which preceded the enactment of the National Labor Relations Act and considered the importance of an economic right guaranteed to the individual to pursue a chosen trade, are helpful to this analysis.

The Supreme Court in 1884 in *Butchers' Union Slaughterhouse and Livestock Landing Co.* v. *Crescent City Livestock Landing & Slaughterhouse Co.*, 111 U.S. 746 (1884), overturned a Louisiana monopoly statute which had the effect of denying citizens of Louisiana the right to pursue a chosen trade. Justice Bradley in his concurring opinion presented some important historical background on the issues involved in the case, specifically, the right of men to follow a given occupation. Tracing this right back to the common law of England and the Act of 21 James I, Justice Bradley described these anti-monopoly laws as:

> One of the constitutional landmarks of British liberty, like the petition of right, the habeas corpus act, and other great constitutional acts of parliament. They established and declared one of the inalienable rights of free men which our ancestors brought with them to this country. *The right to follow one of the common occupations of life is an inalienable right*; it was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen. *Id.* at 762 (emphasis added).

Thus, did Justice Bradley trace the history of the right of association from its early inception in common law England to the beginning of our country and the Declaration of Independence. It was this "primordial and fundamental right" which was subsequently embodied in the First Amendment of the Constitution. He stated that this right "to follow any of the ordinary callings of life" is one which belongs essentially to the citizens of every free government. *Id.*

In another concurrence in the same opinion by Justice Field, this right was described as "the liberty of the individual to pursue a lawful trade or employment;" an "inherent right lying at the foundation of all governmental action" and recognized as such in this country by the Declaration of Independence, *Id* at 756. Justice Field quoted from Mr. Adam Smith, Wealth of Nations, Book 1, Chapter 10, in further delineating this right:

> The property which every man has in his own labor, as *it is the original foundation of all other property, so it is the most sacred and inviolable*. The patrimony of the poor man lies in his strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberties of the workman and of

> those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper. *Id.* at 757 (emphasis added).

It was this same right which the state of Arizona sought to insulate in its constitutional amendment providing that "no person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, and prohibiting anyone to enter into any agreement which excludes any person from employment or continuation of employment because of non-membership in a labor organization." The Supreme Court upheld the right of the State of Arizona to enact this provision in *American Federation of Labor* v. *American Sash & Door Company*, 335 U.S. 538 (1949). In the concurring opinion written by Justice Frankfurter, this right to work of the employee is clearly delineated as "a right of association." *Id.* at 546. Mr. Frankfurter also describes these rights as "cherished rights." *Id.* at 550.

Having considered the right to refrain in its historical context, it becomes clear that the Court's holding and rationale in *Novotny*, 442 U.S. at 366, is simply not applicable to the current proceedings. *Novotny* involved a male plaintiff seeking to redress the violations of his statutory rights guaranteed under Title VII via the remedial processes of 1985(3). *Novotny* asserted no rights which pre-existed the enactment of Title VII; therefore, the Court's finding in *Novotny*, that the Plaintiff was not entitled to the remedial processes of § 1985(3), is not in any way related to the Respondents' assertion in *Scott* v. *Moore* of associational rights which existed prior to the National Labor Relations Act. Accordingly, any reliance by the Petitioners on the holding of *Novotny* as foreclosing the Respondents' right to bring a claim under § 1985(3) is not supportable as a close review of the rights involved in the individual proceedings reveals.

Section 1985(3) extends its coverage to the deprivation of "the equal protection of the laws or of equal privileges and immunities under the laws." These rights have been recognized as including "federally protected rights." In *Griffin* v. *Breckenridge*, 403 U.S. 88, 106 (1971), the Supreme Court recognized these rights as including the right to travel interstate which is a federal right included in the privileges and immunities of national citizenship. Similarly, the right of association, of peaceable assembly or to pursue a chosen trade "is and always has been one of the attributes of citizenship under a free government," *Twining* v. *New Jersey*, 211 U.S. 78, 97 (1908); and a "primordial and fundamental right," *Butchers Union*, 111 U.S. at 762.

The Petitioners' reliance on the limited existence of the right to refrain from organization is simply without support as a review of law and history reveals. To diminish the scope of such a fundamental right to the limited reach of the National Labor Relations Act would severely distort the basic foundation of our legal system. This "inalienable right" as guaranteed in the Declaration of Independence is certainly one to which the Respondents have a justifiable claim. In this proceeding, they seek merely the protection of the laws to which all citizens are entitled.

B. The Congress And Federal And State Courts Have Created Numerous Exceptions To The *Garmon* Doctrine Of Board Preemption Of Labor Disputes.

Defendants have previously contended that the exclusive remedy of the Respondents, with respect to the violent infringement of their rights in this case, is before the National Labor Relations Board. The argument is premised on the labor law preemption doctrine as set forth in this Court's *Garmon* decision. As will be presented, the *Garmon* preemption doctrine has been infringed upon by numerous exceptions.

The violent nature of the actions against the Respondents was clearly outside the scope of the Board's remedial processes. Violent activity alone has been continually recognized as an exception to preemption and when combined with the inadequate remedies available through the Board, the *Scott* v. *Moore* facts clearly fall outside of the preemption doctrine and well within the scope of §1985(3).

The Board's remedies in a case of this nature are severely limited. The Board cannot award damages for economic harm suffered nor can it enjoin any person whose actions cannot be directly related to a union; they may only enjoin the union and those persons clearly tied to the union from future violent activity. The facts of the present case provide clear evidence of how inadequate the Board's remedies are in a situation where violence is present. The A. A. Cross Construction Company (one of the Respondents herein) initially sought the aid of the National Labor Relations Board to enjoin the violent conduct of the union sympathizers. A settlement stipulation was subsequently entered into and a Board Cease and Desist order was entered against the "Sabine Area Building & Construction Trades Council, AFL-CIO, its officers, agents, successors and assigns" to prevent further harm to persons or property. As the language clearly sets forth, the only persons affected by this order were those who could be directly associated with the union as its "officers, agents, successors or assigns"; those private persons who violated the protected rights of A. A. Cross and his employees were unaffected by the Board's order, no injunctive restraints could issue with respect to those persons unable to be connected to the unions involved. Such a limited remedy does not conflict with a cause of action under 1985(3) which extends its remedial provisions to these private actors and is necessary to sufficiently redress the harm suffered by Respondents.

The general doctrine of National Labor Relations Board preemption of labor disputes was established by the Supreme

Court in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. at 236. The Court in *Garmon* held that the Board has exclusive jurisdiction over labor union activity arguably protected by Section 7 of the Labor Management Relations Act or arguably prohibited by Section 8 of the National Labor Relations Act. This broad pronouncement of Board preemption of labor disputes was made in an effort to avoid potential conflict with comprehensive national labor relation policies in the state courts as well as the federal courts. *Id.* at 245. Thus, both federal and state courts ordinarily lack jurisdiction to resolve a labor dispute that arises under the Act in the context of organizational activity, the bargaining relationship or economic sanctions.

While the *Garmon* decision established the basic premise for Board preemption, it also presented certain exceptions to this newly announced preemption doctrine. First, the Court exempted from the doctrine of federal preemption disputes involving matters of "merely peripheral concern" to the National Labor Relations Act. *Id.* at 243. Second, the Court created an exception where "the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act." *Id.* at 244. This exception was further explained in *Garmon* as follows:

> It is true that we have allowed the states to grant compensation for the consequences, as defined by the traditional law of torts, of *conduct marked by violence* and *imminent threats to the public order* . . . We have also allowed the states to enjoin such conduct . . . State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the *maintenance of domestic peace* is not overridden in the absence of clearly expressed congressional direction. *Id.* at 247 (emphasis added).

The high-water mark for the Board preemption doctrine was established with *Garmon* and immediately thereafter began to recede due to the exceptions contained within the *Garmon* decision, itself, and other statutory and judicial exceptions established over the years.

1. Statutory Exceptions To The Preemption Doctrine.

With the enactment of the Taft-Hartley Amendments to the National Labor Relations Act in 1947, Congress began its intrusion into the exclusive jurisdiction of the NLRB. Section 301 of the Labor Management Relations Act (Taft-Hartley Amendments), permits state and federal court suits for breach of a collective bargaining agreement regardless of whether the particular breach is also an unfair labor practice within the jurisdiction of the Board. Section 303 of the Labor Management Relations Act expressly permits anyone injured by a violation of the National Labor Relations Act, Section 8(b)(4), to recover damages in a federal court even though such unfair labor practices are also remediable under the National Labor Relations Act. Section 14(c) of the National Labor Relations Act allows state agencies and courts to assume jurisdiction in labor disputes over which the Board declines to assert jurisdiction, and Section 14(b) of the National Labor Relations Act allows states to regulate agreements creating compulsory unionism (state right-to-work laws). The proviso to Section 10(a) of the National Labor Relations Act allows the Board to cede jurisdiction to the states in cases where the states have met statutory requirements and the Labor Management Reporting and Disclosure Act assures union members of their constitutional rights in dealing with their exclusive bargaining agent.

These various statutory exceptions have been clearly recognized by the Supreme Court in numerous decisions. In *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville and Vicinity*, 417 U.S. 12 (1974), the Court found that when an activity is arguably both an unfair labor practice and a

breach of a collective bargaining agreement, the NLRB's authority with respect to the activity is not exclusive and does not destroy the jurisdiction of the Courts in suits under the LMRA to enjoin a breach of the agreement. This case involved a suit brought under §§301 and 301(a) of the LMRA.

The right of the individual states to enact right to work laws under 14(c) of the National Labor Relations Act has also been upheld by the Supreme Court. In *Retail Clerks International Association, Local 1625 (AFL-CIO)* v. *Schermerhorn*, 375 U.S. 96 (1963), the Court recognized that state courts, rather than solely the NLRB, were tribunals with jurisdiction to enforce a state's prohibition against an "agency shop" clause in a collective bargaining agreement.

2. Judicial Exceptions To The Preemption Doctrine.

Using the *Garmon* exceptions as a springboard, the Supreme Court has found numerous exceptions to be applicable to various fact situations in the labor context. The courts have traditionally found concurrent jurisdiction where the traditional law of torts is involved even if there is an overlap with the Board's jurisdiction.

In *Linn* v. *United Plantguard Workers Local 114*, 383 U.S. 53 (1966), the Court found that a state court does have jurisdiction to apply state remedies in a union campaign defamation case, rejecting the *Garmon* formula with regard to the union activity being protected or prohibited by the Act. The Court found the defamation claim to be a matter of overriding state interest which was "merely a peripheral concern of the Act." *Garmon* 359 U.S. at 243. The Supreme Court in *Linn* also relied on the court's competence to award damages, both compensatory and punitive, as a reason for finding concurrent jurisdiction, establishing an exception where the Board's remedial processes are considered by the Court to be inadequate.

In the more recent Supreme Court decision, *Farmer* v. *United Brotherhood of Carpenters & Joiners of America, Local 25*, 430

U.S. 290 (1977), the Court again applied both of the exceptions established in the *Linn* case. The *Farmer* case involved tortious activity in the form of intentional infliction of emotional distress as well as the consideration of the inadequacy of Board remedies. The suit was brought in state court by a union member against the union and its officials to recover damages for the intentional infliction of emotional distress. The Court in *Farmer* additionally focused on the violent nature of the activities involved, citing the all important exception from *Garmon* of allowing concurrent jurisdiction where violence or threats of violence are involved.

Another important exception to the preemption doctrine is the duty of fair representation as adopted by the Supreme Court in *Vaca* v. *Sipes*, 386 U.S. 171 (1967). The *Vaca* v. *Sipes* test for a breach of the duty of fair representation is:

> Under this [fair representation] doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any [individual], to exercise discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Id.* at 177

The state and federal courts have consistently been found to have concurrent jurisdiction in this area with the Labor Board.

In *Connell Construction Company, Inc.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), the Supreme Court held that the federal courts may decide labor questions that emerge as collateral issues in a suit brought under independent federal remedies, including the anti-trust laws. Accordingly, the Supreme Court found that the union's agreement with the company was subject to the federal anti-trust laws and federal court jurisdiction, providing yet another exception to the preemption doctrine.

In *Alexander* v. *Gardner-Denver Company*, 415 U.S. 36 (1973), the Court found concurrent jurisdiction in an employment discrimination case. The employee working under a collective bargaining agreement was found to have two remedies available to him in employment discrimination: (1) arbitration under the collective bargaining agreement for racial discrimination or (2) a Title VII action through the Equal Employment Opportunity Commission and the courts. The Court found that the right of the plaintiff to bring a Title VII action could not be foreclosed by his first having submitted to the arbitration process. Similarly, the Sixth Circuit has found that prior litigation of an unfair labor practice charge before the National Labor Relations Board does not bar a Title VII claim under the federal statute, because the NLRB deals only with discrimination that interferes with the right to organize. *Tipler* v. *E. I. DuPont de Nemours & Company*, 443 F.2d 125 (6th Cir. 1971).

This finding of concurrent federal court jurisdiction, where labor law questions are collateral issues to suits brought under independent federal statutes, has also been upheld in a case involving 42 U.S.C. § 1985 (3), the statute involved in *Scott* v. *Moore*. In *Silkwood* v. *Kerr-McGee Corporation*, 637 F.2d 743 (10th Cir. 1980), that Court found that the National Labor Relations Board did not have exclusive jurisdiction over the claims asserted in that the deprivation of civil rights through a conspiracy could rarely if ever come within the protection of the National Labor Relations Act and thus produce a substantive conflict of law. Additionally, the Court found that the Board lacked the power to award damages against any of the parties involved in the *Silkwood* case. Balancing such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation, the Court found that concurrent jurisdiction of the federal court with the Labor Board in this instance was proper. Although the Court did not ultimately find that plaintiff's claims were adequate under

the federal statute, the *Silkwood* case is nevertheless important as precedent for finding concurrent jurisdiction of the NLRB and federal courts with regard to 42 U.S. § 1985 (3).

One of the more important Supreme Court decisions regarding exceptions to the preemption doctrine is *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978). Providing further clarification as to the scope of the preemption doctrine, the Court found *Garmon* inapplicable to labor disputes involving union picketing which violated state trespass laws.

The Supreme Court's decision in *Sears* is noteworthy not only for establishing the additional exception to the *Garmon* doctrine of state court jurisdiction over trespass to private property in a labor situation, but also for its approach to the *Garmon* rationale. The Court stated:

> The critical inquiry, therefore, is not whether the state is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to or different from that which could have been, but was not presented to the Labor Board. *Id.* at 197.

The Court found that there is a potential distinction between state law not specifically addressed to labor relations and state law that is. The above passage seems to indicate that the two areas converge only if the general law of the state asks the same questions of the facts as a state labor relations law would have asked. This new approach to the rationale of *Garmon* further delineates the scope of the preemption doctrine.

3. National Labor Relations Board Exceptions to the Preemption Doctrine.

The Labor Board itself has continuously recognized an important exception to its preemption of labor disputes. To encourage voluntary settlement of labor disputes, the Board has consistently deferred to the grievance and arbitration machinery

established under a collective bargaining agreement. *Spielberg Manuf. Co.*, 112 NLRB 1080 (1955).

The numerous examples presented above, where the Board and courts have concurrent jurisdiction over a labor law issue, certainly provide a clear basis for the Respondents maintaining a cause of action under § 1985(3) where the facts involved, "conduct marked by violence and imminent threat to the public order," *Garmon*, 359 U.S. at 247, and the Board's remedies were clearly inadequate, two clearly recognized exceptions to preemption.

The records from the House conference report on the Taft-Hartley Act, H.R.Rep. No. 510 (80th Congress, 1st Session), page 52, indicate that members of Congress recognized the likelihood of concurrent jurisdiction between the Labor Board and the courts. This reference in the legislative records to the existence of concurrent jurisdiction as well as the numerous statutory and judicial exceptions established over the years lend credence to the finding of concurrent jurisdiction in this instance.

CONCLUSION

The right to follow one of the common occupations of life is an inalienable, fundamental right. As a fundamental right, citizens who come within the scope of § 1985(3) and whose fundamental rights are violated, are protected by the remedies available under the statute.

The National Labor Relations Act is legislation aimed at regulating specific problems of management and labor with regard to protection of employee rights. However, the remedies available under the Act are severely limited. There is no redress for the individual where violence is involved, as exhibited by the restrictive injunctions and lack of damages. Where a fundamental right has been violated, an individual is entitled not only to the protection of the Act but to all other available remedies

that are not in conflict with that Act. Accordingly, to protect the Respondents' fundamental rights which have been violated, they must have access to the remedies available under § 1985(3).

Therefore, the decision of the Court of Appeals of the Fifth Circuit must be upheld so that justice might be done.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Motion for Leave to File Amicus Curiae Brief and Amicus Curiae Brief was mailed Certified Mail, Return Receipt Requested to all counsel of record on this the 15 day of March, 1983.

Tom Martin Davis, Jr.